

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LYNN ANDERSON,

Defendant-Appellant.

UNPUBLISHED

January 30, 2007

No. 261933

Muskegon Circuit Court

LC No. 03-049533-FC

Before: Sawyer, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to 35 to 65 years' imprisonment. Defendant now appeals as of right, and we affirm.

Defendant first argues on appeal that his defense counsel rendered ineffective assistance. We disagree. Of the six bases of ineffective assistance of counsel claimed by defendant, none demonstrate that any error by counsel, if one occurred, was so serious that there is a reasonable probability that, without the error, the outcome of trial would have been different.

There was no posttrial evidentiary hearing, so our review is limited to mistakes apparent from the record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and law. *Id.* Questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to justify reversal, defendant must show counsel's deficient performance constituted errors so serious that defendant was denied his Sixth Amendment right to counsel and there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001).

The first claimed basis of ineffective assistance of counsel is that defense counsel failed to effectively cross-examine Rural Keith Carroll. We conclude that defense counsel's cross-examination was not ineffective. There is no factual variance between Carroll's trial testimony and his earlier testimony, as claimed by defendant. In each instance, Carroll testified that

Buchanan told him that the altercation at the Hall house took place the same day Wendy Currie was found dead. Therefore, different or more extensive cross-examination would not have resulted in diminishing Carroll's credibility on that point. Defense counsel committed no error and was not ineffective.

The second claimed basis of ineffective assistance is defense counsel's failure to object to, or move to strike, Carroll's references during his testimony to having taken, and passed, a polygraph examination. Decisions regarding the questioning of witnesses are presumed to be trial strategy. *People v Bass (On Rehearing)*, 223 Mich App 241, 252-253; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 866 (1998). A reviewing court should inspect the challenged action, however, to determine whether it was a sound strategic decision. *People v Tommolino*, 187 Mich App 14, 17-19; 466 NW2d 315 (1991). It is a bright-line rule that testimony concerning a polygraph examination is not admissible at trial. *People v Jones*, 468 Mich 345, 351; 662 NW2d 376 (2003). Therefore, counsel's decision not to object was not *sound* trial strategy. Nevertheless, the jury was ultimately instructed that Carroll's testimony regarding the polygraph was not evidence, and that the result of the examination was irrelevant. A jury is presumed to follow the instructions given to them by the court, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and instructions are presumed to cure most errors. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Under the circumstances, we find that there is no reasonable probability that, but for counsel's error, the outcome of defendant's trial would have been different.

The third claimed basis of ineffective assistance is defense counsel's failure to object to four instances of testimony, which defendant characterizes as inadmissible hearsay. First, he challenges Willie McCowan's testimony regarding Hazel Buchanan's statement that defendant killed the victim. We conclude that the testimony was admissible as impeachment evidence of Buchanan's testimony that she never told anyone defendant killed Currie. See *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). Because the evidence was admissible, defense counsel was not ineffective for failing to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Next, defendant challenges McCowan's testimony regarding the statement to Buchanan's daughter confirming that defendant killed Currie. We agree that the testimony was inadmissible hearsay, not admissible for any proper purpose. Nevertheless, even if counsel's failure to object was not sound trial strategy, defendant has failed to show that, but for the error, the outcome would have been different. *Carbin, supra*. We note that the daughter's statement was merely cumulative to Buchanan's admissible statement.

Defendant also challenges David Pierce's testimony regarding statements made by the victim's employer in Holland and by Buchanan herself. Defendant concedes that the testimony regarding the statement made by the employer is not "significant enough to create a reasonable probability of a different result." And, we find that the testimony regarding the statement made by Buchanan was admissible. It was impeachment evidence. Therefore counsel was not ineffective for failing to object to the testimony. *Snider, supra*.

The fourth claimed basis of ineffective assistance of counsel is defense counsel's alleged failure to object to inadmissible other-acts evidence. Defendant challenges Laurie Buckley's testimony regarding defendant's physical abuse of her. Evidence of other crimes, wrongs, or acts of a defendant is inadmissible to prove a propensity to commit such acts. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998), citing MRE 404(b). Other-acts evidence,

nonetheless, is admissible for purposes other than to show conformity with character. MRE 404(b)(1). The challenged evidence in this case was properly admissible under MRE 404(b). It was offered for a proper purpose and was relevant for that purpose, specifically assisting the prosecutor in showing intent as an element of malice and rebutting the defense of accident. Its probative value was not otherwise outweighed by the danger of unfair prejudice. Because the evidence was properly admissible, *id.* at 385, defense counsel's failure to object was not ineffective.

The fifth claimed basis of ineffective assistance of counsel is defense counsel's failure to request a jury instruction on involuntary manslaughter. Involuntary manslaughter is a necessarily included lesser offense of murder, but an instruction on involuntary manslaughter must be given only if supported by a rational view of the evidence. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003). Because a rational view of the evidence would not have supported the charge, it would not have been proper to provide it to the jury. The sole element that distinguishes manslaughter from murder is malice. *Id.* at 536. Malice is present if the actual intent is to inflict great bodily harm or to act in obvious disregard of life-endangering consequences. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). There was no evidence presented at trial to support that defendant did not act with at least the culpability necessary to find malice. A claim of ineffective assistance of counsel that is based on defense counsel's failure to object, where the failure could not have affected defendant's chances for acquittal, is without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Therefore, counsel was not ineffective on this basis.

The sixth claimed basis is that the cumulative effect of counsel's errors resulted in ineffective assistance. We only found two areas in which an objection by trial counsel would have been successful: The testimony regarding the polygraph and one instance of claimed hearsay. Even considered together, we do not believe these errors constitute ineffective assistance of counsel.

Defendant next argues on appeal that he was denied a fair trial by Carroll's numerous references, while testifying, to taking and passing a polygraph examination. The admission of polygraph evidence was plain error. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, this error was waived when defense counsel not only failed to object to the testimony at trial, he declined the trial court's offer of a curative instruction. Finally, when the jury sent a note to the trial court during its deliberations regarding the testimony, defense counsel participated in crafting a response to the jury's question on the subject. Defendant waived this issue and that waiver extinguished any error. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Affirmed.

/s/ David H. Sawyer
/s/ Janet T. Neff